

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LUIS PICHARDO)	
Claimant)	
VS.)	
)	Docket No. 1,018,424
TRIPLE T PALLETS)	
Respondent)	
AND)	
)	
FIRSTCOMP INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the February 14, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ awarded claimant preliminary benefits of temporary total disability compensation and the payment of past medical expenses. An authorized treating physician was not named, nor did the ALJ order respondent to provide a list of three physicians from which claimant could choose one to be his authorized treating physician. Instead, the ALJ ordered an independent medical examination of claimant to be performed by Dr. Paul Stein "for diagnosis, causation opinion and treatment recommendations, if any."¹

On appeal, respondent contends that the ALJ erred in finding claimant suffered personal injury by accident that arose out of and in the course of his employment and that claimant provided timely notice. Those are the issues for the Board's review.

¹ Order (Feb. 14, 2005) at 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges he injured his back while performing his regular job duties for respondent on July 1, 2004.² At the September 28, 2004 preliminary hearing, claimant testified that he injured his back somewhere around the end of June and also that it was the last week of June. At the January 25, 2005 preliminary hearing, claimant testified his accident “was between the 29th and 30th of June or the 1st of July, one of those three days.”³ Claimant said he was performing his regular job duties of constructing pallets on one of those dates in late June or early July 2004, when he felt a strong pain in his back as he was lifting and stacking pallets.

Claimant said he reported his injury to Jeffrey Thompson, the owner of the respondent company, through a co-worker, Edgar Soto Garcia, who often interprets for Mr. Thompson. According to claimant, Mr. Thompson told him to go home. After several days of being off work, claimant returned to Mr. Thompson and informed him that he was still feeling bad. Mr. Thompson again did not send claimant to a doctor, but instead advised him to call on the phone if he continued to feel bad.

Claimant had a prior back injury in June of 2003 while working for his previous employer, Kansas Pallets and Wood Recycling. He had treated with Dr. Praful C. Mehta for that injury. As Mr. Thompson did not direct claimant to the respondent’s physician, claimant went on his own to Dr. Mehta on July 5, 2004. An MRI scan, performed on July 28, 2004, showed a “central/right paracentral disc herniation at L4-5 with a right paracentral disc herniation and annulus tear at L5-S1.”

Respondent disputes claimant’s testimony concerning both that he suffered a work-related accident and that he gave timely notice of an accident. Respondent points to the medical records of Dr. Mehta for the July 5, July 28 and July 30, 2004 office visits, which contain no mention of a work-related injury at Triple T Pallets. Likewise, the off-work slips from Dr. Mehta do not mention a work-related injury with respondent. The records from Heartland Open MRI contain a history that claimant’s treatment should be covered by workers compensation insurance based on the injury he suffered at Kansas Pallets and Wood Recycling. There is no mention in the Heartland Open MRI records of an injury at Triple T Pallets. Respondent contends that it was not until August 19, 2004, that Dr. Mehta’s records referenced claimant having suffered an injury at Triple T Pallets. And that before that date, Dr. Mehta was proceeding on the assumption that the condition was a continuation of the 2003 injury at Kansas Pallets and Wood Recycling. However, a

² Form K-WC E-1 Amended Application for Hearing (filed Nov. 15, 2004). The original Application for Hearing that was filed on August 6, 2004, alleged an accident date of July 6, 2004.

³ P.H. Trans. (Jan. 25, 2005) at 8.

medical record of August 4, 2004, from Dr. Mehta shows a date of accident of July 6, 2004,⁴ and a medical record of August 6, 2004, from Healthsouth shows a date of accident of July 7, 2004.⁵

Jeffrey Thompson testified that claimant never reported a work-related injury to him either in person or through an interpreter. He acknowledged that claimant presented him with off-work slips from Dr. Mehta but said he was not aware that claimant was attributing his injury to work. Mr. Thompson said he first learned that claimant was alleging a work-related injury when he received a letter from claimant's attorney on or about August 5 or 6, 2004. He recalled that sometime after receiving the letter from claimant's attorney, somebody interpreted for claimant something about his seeing a doctor. Mr. Thompson said that whenever an injury is reported, the worker is directed to meet with David Grisamore and, if medical treatment is necessary, the worker is sent to the company physician, Dr. Watson. Mr. Thompson said that all employees are aware that Dr. Watson is the company physician that treats on-the-job injuries. When claimant was missing work in June and July 2004, it was Mr. Thompson's understanding from Mr. Grisamore that claimant was seeing a doctor because claimant had injured his back at home. The only time he recalls sending claimant home from work was one time when claimant said he was sick.

David Grisamore testified that he is the health and safety officer for Triple T Pallets. He said he never received a report of a work-related injury from claimant. However, when claimant was absent from work for three consecutive days in June 2004, Mr. Grisamore said that he asked claimant about it and was given the impression that claimant had injured his back at home over the previous weekend. Mr. Grisamore testified that claimant missed work on June 21, 22, 23 and 30 and July 1, 2, 5, 6, 7 and 8, and July 9 through 15, 2004. Mr. Grisamore also said that when he asked claimant why he was missing work, claimant said he was sick.

At the September 28, 2004 preliminary hearing, Mr. Grisamore testified as follows:

Q. (Mr. Laskowski) Okay. Did he indicate to you whether that injury occurred at home?

A. (Mr. Grisamore) That was the indication I got from what he had told me.

⁴ P.H. Trans. (Sep. 28, 2004), Resp. Ex. 2.

⁵ P.H. Trans. (Sep. 28, 2004), Resp. Ex. 3.

Q. Okay.

A. His English isn't very good, it's very, very broken.⁶

Mr. Soto, who was a co-worker with claimant at the respondent company, testified that he sometimes interpreted Spanish to English for his boss, Mr. Thompson. Around the end of June or the first of July 2004, claimant informed him that his back hurt. Mr. Soto's handwritten statement, which he signed but did not write, says claimant told him he hurt his back at work. But when he testified, Mr. Soto said claimant only told him that his back hurt, not that he injured his back while working or how he hurt his back.

Q. (Mr. Johnston) Around the end of June 2004 or the first of July 2004, did Mr. Pichardo say something to you about his back?

A. (Mr. Soto) Yes, that his back hurt. Something like that, he said his back hurt.

Q. Did he tell you what he was doing when his back hurt?

A. No, just that when he was working his back hurt.⁷

Mr. Soto said he helped claimant tell this to their boss, Jeffrey Thompson, and that Mr. Thompson told claimant he could go home. Mr. Thompson denied such a conversation ever took place and further testified that the payroll records show that claimant was not at work on either June 30 or July 1, 2004. He did acknowledge that claimant was at work on June 29, 2004.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.⁸ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁹

⁶ P.H. Trans. (Sep. 28, 2004) at 39.

⁷ P.H. Trans. (Jan. 25, 2005) at 14-15.

⁸ K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

⁹ K.S.A. 2004 Supp. 44-508(g); *see also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.¹⁰ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹¹

Claimant has a history of low back problems that pre-date the accident alleged in this case. Nevertheless, it is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹² "The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition."¹³

The Amended Application For Hearing alleges a single accident date of July 1, 2004. Claimant's most recent testimony is that his accident occurred on June 29, 30 or July 1, 2004. Respondent's witnesses testified that claimant was not at work on June 30 nor on July 1. Furthermore, Mr. Grisamore testified that claimant missed three consecutive days from work on June 21, 22 and 23 due to his back. There is obviously a language barrier between claimant and his supervisors, with claimant being primarily Spanish-speaking and Mr. Thompson and Mr. Grisamore being primarily English-speaking. This could explain some of the contradictory testimony and could perhaps establish just cause for a failure to give clear notice of accident within 10 days. But it does not explain the conflict between the alleged accident date or dates and the dates claimant missed work. Furthermore, the medical records contain several different histories, including conflicting accident dates. Perhaps claimant is confused about when his accident happened or perhaps he had an illness that caused him to miss work from June 21 to 23, rather than it being due to back problems as Mr. Grisamore believed. There was testimony about a stomach flu spreading through respondent's workforce during that time period. But it is claimant's burden to prove how and when he suffered personal injury by accident. This record fails to satisfy that burden.

¹⁰ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

¹¹ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

¹² *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

¹³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 14, 2005, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of June 2005.

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director